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Doctrine of Sovereign Immunity in Wyoming: Current Status of the Doctrine and Arguments for Abrogation, The

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The Doctrine of Sovereign Immunity in Wyoming: Current Status of the Doctrine and Arguments for Abrogation

The purpose of this comment is to analyze the continuing development of the doctrine of sovereign immunity in Wyoming. Most commentators have discussed the doctrine as it has been applied to tort and contract cases.[1] This comment, however, will address the doctrine's applicability in a water right abandonment action brought before an administrative tribunal. A comparison of the arguments the state can put forth in support of the doctrine and the arguments the contestant in the water right abandonment action can put forth to oppose the application of the doctrine will be presented.

Factual Setting

For illustrative purposes the following hypothetical situation will be referred to throughout this comment. The contestant, Adam, a private party, initiates before the Wyoming Board of Control[2] a water right abandonment action against the contestee, Baker, who is also a private party.[3] The contestee Baker is a lessee of state-owned lands. Because the state holds the reversionary interest in the lands involved, it is joined as a party to the abandonment action and it appears through its Board of Land Commissioners.[4] Once joined, the Board of Land Commissioners argues that an action to abandon state-owned water rights is an action against the state and that the Board of Control is without jurisdiction to entertain the action because of the doctrine of sovereign immunity.

After a full hearing, the Board of Control concludes that the doctrine of sovereign immunity is inapplicable.[5] The Board declares the water rights, appurtenant to the state-owned lands, abandoned. The state through the Board of Land Commissioners, then seeks judicial review of the Board of Control's decision in a Wyoming district court. Because of the importance of the sovereign immunity issue, the district court certifies the question to the Wyoming Supreme Court.[6]

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1. *See* Minge, *Governmental Immunity From Damage Actions in Wyoming*, 77 Land & Water L. Rev. 229-62, 618-62 (1972); Borchard, *Government Liability in Tort*, 34 Yale L.J. (1924); Comment, *Wyoming's Governmental Claims Act: Sovereign Immunity with Exceptions—A Statutory Analysis*, 15 Land & Water L. Rev. 619 (1980); Note, *Sovereign Immunity—A Still Potent Concept in Wyoming*, 16 Wyo. L. J. 304 (1962); Note, *Sovereign Immunity of the State of Wyoming*, 14 Land & Water L. Rev. 271 (1979).

2. Wyoming provides for these types of actions in Wyo. Stat. § 41-3-401 (1977).

3. For purposes of this comment, it will be assumed that the contestant has satisfied the standing requirements set out in Platte County Grazing Ass'n v. State Bd. of Control, 675 P.2d 1279 (Wyo. 1984).

4. Wyo. Const. art. 18, § 3 creates the Board of Land Commissioners and empowers it to lease state-owned lands.

5. Wyo. Stat. § 16-3-110 (1977). This section of the Wyoming Administrative Procedure Act requires administrative agencies to include findings of law and fact in final decisions in contested cases.

6. W.R.A.P. 12.09.

SOVEREIGN IMMUNITY GENERALLY

The term "sovereign immunity" generally means that the state cannot be sued in court.[7] This definition of the term "sovereign immunity" has been accepted in Wyoming.[8] The Wyoming Supreme Court has distinguished sovereign immunity from "governmental" or "municipal immunity."[9] The former term refers to the state whereas the latter refers to various subdivisions within the state such as towns, cities, and counties.[10] In other jurisdictions and occasionally in Wyoming,[11] the two are used interchangeably and this can lead to confusion. In this comment the term sovereign immunity will refer to the state's immunity from suit.

The doctrine of sovereign immunity has its origin in the ancient common law of England.[12] The doctrine arose out of the principle that for a court to have any power it must be supreme to the parties coming before it.[13] Therefore, because the King of England was supreme to all but God, the courts were powerless to entertain suits against him as the sovereign.[14] The legal fiction adopted by the courts that "the King can do no wrong" was the core of the common law doctrine of sovereign immunity.[15]

There are two theories for the origin of the doctrine of "governmental immunity." The first theory, the majority view, is that the doctrine originated in 1788 in the English case of *Russell v. The Men of Devon*.[16] In *Devon,* the plaintiff suffered damage to a wagon because of the county's failure to adequately maintain a bridge. The plaintiff then filed suit against the inhabitants of the county. The court denied the plaintiff relief on the ground that the county was immune from such suits. It reasoned that because counties were not corporate entities and, in turn did not possess a "corporate estate" from which the judgment could be satisfied, any judgment would have to be satisfied by recovery against the inhabitants of the county directly.

The second theory, the minority view, differs slightly from the majority view. The minority of jurisdictions contend that governmental immunity is, much like sovereign immunity, an ancient common law doctrine which was in existence long before the court decided *Devon*.[17] Specifically, the jurisdictions adhering to the minority view rely on Lord Kenyon's parting words in *Devon*: "Therefore, I think that this experiment ought not to be encouraged; there is no law or reason for support-

7. 72 AM. JUR. 2D *States* § 99 (1974).

8. Utah Constr. Co. v. State Highway Comm'n, 45 Wyo. 403, 423-24, 19 P.2d 951, 955 (1933).

9. Oroz v. Board of County Comm'rs, 575 P.2d 1155, 1158 n.6 (Wyo. 1978); Worthington v. State, 598 P.2d 796, 800 (Wyo. 1979).

10. Worthington v. State, 598 P.2d 796, 800 (Wyo. 1979).

11. Jivelekas v. City of Worland, 546 P.2d 419, 420 n.2 (Wyo. 1976).

12. Worthington v. State, 598 P.2d 796, 800 (Wyo. 1979); 1 W. BLACKSTONE, COMMENTARIES *241-49.

13. 1 W. BLACKSTONE, COMMENTARIES *241-49.

14. *Id.* at *242.

15. *Id.* at *246.

16. 2 Term. Rep. 667, 100 Eng. Rep. 359 (1788).

17. Maffei v. Town of Kemmerer, 80 Wyo. 33, 43, 338 P.2d 808, 810-11 (1959).

ing the action; and there is a precedent against it in Brooke: though even without that authority I should be of opinion that this action cannot be maintained."[18] Lord Kenyon referred to a publication entitled *Brooke's Abridgement* which cited authority for governmental immunity. Since *Brooke's Abridgement* ceased to be published in 1558 the minority view is that the doctrine of governmental immunity was in existence even before this date and as such did not have its origin in the *Devon* case.[19]

The differences between the minority and the majority views are significant in determining the manner in which governmental immunity originated in Wyoming. If the doctrine was in existence in 1607 then it was adopted by statute in Wyoming.[20] The Wyoming legislature adopted the common law of England, as it existed in 1607, when it enacted section 8-1-101 of the Wyoming statutes.[21] Under this statute, whenever an issue is not governed by a statute, the courts are to look to the common law of England as the rule of decision.[22] If, however, the doctrine did not come into existence until *Devon*, then its application to Wyoming was by judicial and not by legislative action.[23]

The essence of both of these doctrines is to prevent suits against governmental entities. For this reason the arguments used to justify the application of sovereign immunity have also been used in the governmental immunity context. In the past these doctrines have been justified on the grounds that if suits are brought against the government then the public fisc will be drained.[24] Without money the government cannot operate, therefore the government must be protected from suit. This argument has not proved to be completely convincing because states have been abrogating or limiting the effects of these doctrines.[25] At present all fifty states and the District of Columbia have either abrogated or limited these doctrines in some way.[26]

STATUS OF SOVEREIGN IMMUNITY IN WYOMING

The doctrine of sovereign immunity is still alive in Wyoming. The doctrine of governmental immunity, however, was vitiated by the Wyoming

18. 2 Term. Rep. 667, 673, 100 Eng. Rep. 359, 362 (1788).
19. Maffei v. Town of Kemmerer, 80 Wyo. 33, 43, 338 P.2d 808, 811 (1959).
20. *In Re* Smith's Estate, 55 Wyo. 181, 97 P.2d 677 (1940).
21. WYO. STAT. § 8-1-101 (1977) reads:

> The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory or remedial acts or statutes made in aid of, or to supply the defects of the common law prior to the fourth year of James the First (excepting the second section of the sixth chapter of forty-third Elizabeth, the eigth chapter of thirteenth Elizabeth and ninth chapter of thirty-seventh Henry Eighth) and which are of a general nature and not local to England, are the rule of decision in this state when not inconsistent with the laws thereof, and are considered as of full force until repealed by legislative authority.

22. Schlathman v. Stone, 511 P.2d 959 (Wyo. 1973); Snell v. Ruppert, 541 P.2d 1042 (Wyo. 1975).
23. Oroz v. Board of County Comm'rs, 575 P.2d 1155, 1157 (Wyo. 1978).
24. *See* Jones v. State Highway Comm'n, 557 S.W.2d 225, 228-29 (Mo. 1977).
25. *See* RESTATEMENT (SECOND) OF TORTS § 895B (Tent. Draft No. 19, 1982).
26. *Id.*

Supreme Court in *Oroz v. Board of County Commissioners*.[27] In *Oroz*, the plaintiff was injured in an automobile accident in Carbon County. He brought an action for damages against the driver of the other automobile and joined the Board of County Commissioners of Carbon County as a defendant. The county filed an answer along with a motion to dismiss, arguing that the doctrine of governmental immunity barred the plaintiff's action. The trial court granted the county's motion to dismiss.[28]

The Wyoming Supreme Court found that the doctrine of governmental immunity had its origin in the case of *Russell v. The Men of Devon* (the majority view)[29] and was therefore of judicial origin and susceptible to judicial abrogation.[30] The court noted the unfairness of the doctrine to those who suffer tortious injury and then abolished the doctrine in Wyoming. In reaching its decision the Wyoming Supreme Court was careful to distinguish governmental immunity from sovereign immunity and left the state's immunity from suit unaffected.[31] After *Oroz*, it was hoped that the Wyoming Supreme Court would also dispose of the doctrine of sovereign immunity given the proper factual setting.

The year following the *Oroz* decision, the Wyoming Supreme Court decided the case of *Worthington v. State*[32] and instilled new vitality into the doctrine of sovereign immunity. In *Worthington*, the plaintiffs were injured in two separate incidents that they claimed were caused by the State Highway Department's negligence. The court echoed its previous decisions that sovereign immunity in Wyoming is constitutionally based and that the court is without power to abrogate the doctrine.[33] This is in contrast to the court's decision in *Oroz*, where it found that governmental immunity was a judicially created doctrine.[34]

The same year the Wyoming Supreme Court decided *Worthington*, the Wyoming legislature enacted the Wyoming Governmental Claims Act.[35] This Act re-established governmental immunity with a number of exceptions. The Governmental Claims Act applies to contract and tort claims against governmental entities.[36] A "governmental entity" includes the state and all other political subdivisions.[37] Consequently, if sovereign immunity is abolished in Wyoming, then the Governmental Claims Act will re-establish the state's immunity from suit on contract and tort claims except for the exceptions specifically enumerated in the statute.[38]

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27. 575 P.2d 1155 (Wyo. 1978).
28. *Id.* at 1156 (the district court converted the motion to dismiss into a motion for summary judgment).
29. *See supra* text accompanying notes 17-23.
30. Oroz v. Board of County Comm'rs, 575 P.2d 1155, 1158 (Wyo. 1978).
31. *Id.* at 1158 n.6.
32. 598 P.2d 796 (Wyo. 1979).
33. *Id.* at 801-02.
34. 575 P.2d 1155, 1158 (Wyo. 1978).
35. WYO. STAT. § 1-39-101 to -119 (Supp. 1984).
36. WYO. STAT. § 1-39-104 (Supp. 1984).
37. WYO. STAT. § 1-39-103(a)(i) to (ii) (Supp. 1984).
38. WYO. STAT. § 1-39-105 to -112 (Supp. 1984).

The current trend in other states is to limit the applicability of the doctrine of sovereign immunity.[39] Wyoming has been part of this trend by enacting the Wyoming Governmental Claims Act[40] and by waiving governmental immunity to the extent of liability insurance carried by a governmental entity.[41] But in the *Worthington* case, the Wyoming Supreme Court did not follow the trend toward abrogation. Rather, it reestablished the vitality of sovereign immunity in Wyoming. In sum, the doctrine of sovereign immunity is a viable doctrine in Wyoming even though its future is, at best, uncertain.

ARGUMENTS IN FAVOR OF APPLYING SOVEREIGN IMUNITY

Constitutionally Based Sovereign Immunity

In the hypothetical action outlined above, the state, as contestee through the Board of Land Commissioners, would argue that sovereign immunity constitutes a bar to the contestant's action. This argument is easy to support. Article 1, section 8 of the Wyoming Constitution states:

> § 8. Courts open to all; suits against state.
>
> All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. *Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.*[42]

The prevailing view is that article 1, section 8 establishes sovereign immunity and that a legislative enactment is necessary for the state to become open to suit.[43] This view originated in the Wyoming Supreme Court's decision in *Hjorth Royalty Company v. Trustees of University.*[44] In *Hjorth Royalty,* the plaintiff brought an action to quiet title to certain lands. The plaintiffs claimed that they had a legal estate in the lands through an oil placer claim. The plaintiffs conceded that the lands in question were part of a grant to the University of Wyoming by the United States government. The action was dismissed on the grounds that an action against the University was, in essence, a suit against the state. Without legislative approval such an action could not be maintained. The court in *Worthington* referred to the *Hjorth* decision as follows:

> There are few, if any, precedents or rules that have been recognized longer or followed with greater fidelity than the rule that was set out in the case of *Hjorth Royalty Company v. Trustees of University,* 30 Wyo. 309, 222 P. 9 (1924), which held that Art. 1, § 8, Wyoming Constitution is not self-executing; that

39. *See* RESTATEMENT (SECOND) OF TORTS § 895B (Tent. Draft No. 19, 1982).
40. WYO. STAT. § 1-39-101 to -119 (Supp. 1984).
41. WYO. STAT. § 1-39-118(b) (1977).
42. WYO. CONST. art. 1, § 8 (emphasis added).
43. Hjorth Royalty Co. v. Trustees of Univ., 30 Wyo. 309, 313, 222 P. 9 (1924); Worthington v. State, 598 P.2d 796, 801 (Wyo. 1979).
44. 30 Wyo. 309, 222 P. 9 (1924).

> no suit can be maintained against the State until the legislature makes provision for such filing; and, that absent such consent, no suit or claim could be made against the State.[45]

Relying on the plain language of the constitution and the above decisions, the state, in our water right abandonment action, would argue that in the absence of any legislative enactment waiving immunity, the action cannot be maintained because the water rights are appurtenant to state-owned lands.

Legislatively Created Sovereign Immunity

Another argument that the state could use to support the continued existence of sovereign immunity is that the doctrine is not constitutional, but is the product of legislative enactment.[46] By enacting section 8-1-101 of the Wyoming statutes, the legislature adopted the common law of England as the rule of decision in Wyoming.[47] Because sovereign immunity was part of the common law of England in 1607, it became part of the law of Wyoming through the enactment of section 8-1-101. Therefore, according to this argument, sovereign immunity in Wyoming is a legislatively created doctrine and cannot be abrogated by the courts.

This argument was presented to the Wyoming Supreme Court in *Worthington.*[48] The court did not address it because it felt that sovereign immunity in Wyoming is constitutionally based.[49] Therefore, the question of whether this theory has any vitality was left unanswered by the court's decision in *Worthington.*

Under either of these arguments, the legislature must expressly waive immunity for an action to be brought against the state. A review of the Wyoming statutes does not disclose any express legislative waiver of immunity that would permit a water right abandonment action to be brought against the state. In addition, such a waiver cannot be implied because courts have traditionally construed such provisions narrowly and strictly in order to preserve the sovereign's immunity.[50] Courts have construed ambiguous statutes in favor of preserving sovereign immunity because of the belief that if the immunity is reduced or abrogated, a fundamental attribute of sovereignty will be lost and the sovereign's ability to govern will be impaired. Under this view, any statute waiving the sovereign's immunity must do so explicitly.[51]

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45. Worthington v. State, 598 P.2d 796, 801 (Wyo. 1979).
46. *Id.* at 799.
47. *See supra* text accompanying notes 20-23.
48. 598 P.2d 796, 799 (Wyo. 1979).
49. *Id.* at 801.
50. This conclusion can be drawn from the Wyoming Supreme Court's decision in Harrison v. Wyoming Liquor Comm'n, 63 Wyo. 13, 177 P.2d 397 (1947) and Retail Clerks Local 187 v. University of Wyoming, 531 P.2d 884 (Wyo. 1975). The court has held that under any statute in which the state consents to suit the consent must be clearly stated and the statute will be strictly construed. *See generally* 72 AM. JUR. 2D *States* § 121 (1974).
51. Retail Clerks Local 187 v. University of Wyoming, 531 P.2d 884, 886 (Wyo. 1975).

In sum, if a contestant brings a water right abandonment action against the lessee of state-owned lands, he can anticipate confronting the doctrine of sovereign immunity. In support of the doctrine, the state will most likely argue that the doctrine is constitutionally created in article 1, section 8 of the Wyoming Constitution. In addition, the state may argue that the doctrine has its origin in section 8-1-101 of the Wyoming statutes and is therefore statutorily rather than constitutionally based. Under either argument, the state will claim that a legislative enactment is necessary before an abandonment action can be brought. Because there is no such enactment, the state will claim that the contestant's action should be barred.

ARGUMENTS AGAINST SOVEREIGN IMMUNITY

Once confronted with the doctrine of sovereign immunity, the contestant can make the following arguments to avoid the doctrine. First, the contestant can argue that the Wyoming water right abandonment statute constitutes a waiver of sovereign immunity. Second, the contestant can argue that when the Board of Land Commissioners leases state-owned lands, the state is engaging in a proprietary function and no longer enjoys immunity. Third, the contestant can argue that the doctrine of sovereign immunity should be abrogated by the Wyoming Supreme Court.

Waiver of Sovereign Immunity

The contestant can argue that the water right abandonment statute constitutes a waiver of immunity. The water right abandonment statute, section 41-3-401(a) of the Wyoming statutes provides, in part:

> Where the holder of an appropriation of water from a surface, underground or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated, whether under an adjudicated or unadjudicated right, during any five (5) successive years, he is considered as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto.[52]

Unfortunately, the statute does not define "holder" so as to include the state. Nor does the statute explicitly provide that water right abandonment actions can be brought against state-owned water rights. For the statute to provide for a waiver of sovereign immunity, the consent to suit must be clearly shown.[53] Also, statutes which divest pre-existing privileges "will not be applied to the sovereign without express words to that effect."[54] For these reasons, the Wyoming Supreme Court would be unwilling to find that the statute, providing for water right abandonment actions, constitutes a waiver of sovereign immunity.

52. WYO. STAT. § 41-3-401(a) (1977).
53. *See supra* text accompanying notes 50-51.
54. Retail Clerks Local 187 v. University of Wyoming, 531 P.2d 884, 888 (Wyo. 1975).

The state can waive immunity for specific types of actions by statute. In addition, the state's representatives can consent to being sued,[55] so the contestant should consider whether the Board of Land Commissioners has the authority, as the state's representative, to waive immunity in an abandonment action. Also, since the Wyoming Attorney General will be representing the Board of Land Commissioners in the abandonment action, there is the question of whether the Attorney General can consent to the suit being brought against the state. Neither the Wyoming Constitution nor the Wyoming statutes enable the Attorney General to consent to this action. Section 1-35-104 of the Wyoming statutes does give the Attorney General "full discretionary powers to prosecute all investigations and litigation."[56] Whether this includes the ability to waive immunity is doubtful because any waiver of sovereign immunity must be explicitly stated in the statutes.[57] Absent either a constitutional provision or a legislative enactment allowing the Board of Land Commissioners or the Attorney General to consent to having the state sued in a water right abandonment case, the state is immune from such a proceeding.

Proprietary Function

The contestant can try to portray the Board of Land Commissioners as performing a proprietary rather than a governmental function.[58] Generally, if the state is performing a proprietary function it loses its character as a sovereign and, in turn, its immunity from suit.[59] Arguably, the Board of Land Commissioners is leasing lands and collecting rent much like a private individual and therefore should not be immune from a water right abandonment action. To counter this argument, the Board of Land Commissioners would contend that the leasing of lands is part of its duties over the lands and is therefore a governmental function.

Unfortunately, there are no hard-and-fast rules for determining where the line between a governmental and proprietary function is. In *National Surety v. Morris,*[60] the Wyoming Supreme Court held that the state engages in a proprietary function and therefore does not enjoy immunity when it deposits funds with a bank.[61] But in *Harrison v. Wyoming Liquor Commission,*[62] the court found that the state was engaged in a governmental function in distributing liquor.[63] The results under the proprietary

55. *See* Williams v. Eaton, 443 F.2d 422, 428 (10th Cir. 1971), where the court suggested that given the proper statutory language a state agency, as the state's representative, could waive the state's immunity.

56. WYO. STAT. § 1-35-104 (1977).

57. Williams v. Eaton, 443 F.2d 422, 428 (10th Cir. 1971).

58. Biscar v. University of Wyoming, 605 P.2d 374, 376-77 (Wyo. 1980). Although the Wyoming Governmental Claims Act abolishes the governmental/proprietary distinction, it is possible that this distinction is abolished only in contract and tort claims. This argument is logical because the Act was a response to a tort action and the Act mentions only contract and tort actions. *See* WYO. STAT. § 1-39-102(b) (Supp. 1984).

59. National Surety Co. v. Morris, 34 Wyo. 134, 151-52, 241 P. 1063, 1067 (1925).

60. *Id.*

61. *Id.*

62. 63 Wyo. 13, 177 P.2d 397 (1947).

63. *Id.* at 33, 177 P.2d at 404.

function argument are not readily predicted. Generally, if the activity involves the health and welfare of the public at large, or is mandated by the legislature, or involves legislative or judicial discretion, it is usually found to be governmental in nature.[64] If the activity is one that has been historically carried on by a private corporation, or if it results in generating fees, then it is usually found to be proprietary in nature.[65] It is therefore an open question whether the Board of Land Commissioners is performing a propietary or a governmental function when leasing state lands.

Judicial Abrogation of Sovereign Immunity

Even when confronted with the waiver and governmental/proprietary function arguments, it is likely that the court would maintain that sovereign immunity bars the contestant's abandonment action. Therefore, the contestant must argue that the Wyoming Supreme Court should abrogate the doctrine of sovereign immunity. Whether the contestant argues that the court should abolish the doctrine of sovereign immunity in general or just as it applies to the water right abandonment action is irrelevant because the arguments he will make are the same under both approaches.

In arguing for abolition of the doctrine, the contestant will be asking the Wyoming Supreme Court to overturn a long-standing precedent and to reverse a series of decisions by that court.[66] Fortunately, this task is not as impossible as it may seem. The doctrine along with the injustices it perpetrates has been criticized by at least one member of the Wyoming Supreme Court.[67] Justice Rose criticized governmental and sovereign immunity in *Jivelekas v. City of Worland.*[68] In that case he set forth statements from courts in other jurisdictions which criticized these doctrines. Regarding the merits of the doctrines, Justice Rose commented:

> I cannot go blindly on embracing an age-old doctrine which not only no longer serves us (if indeed it ever did) but which, in fact, imposes a great disservice upon us when its evils are viewed under the magnifying glass of this different and enlightened age.
>
> Governmental entities in Wyoming should no longer receive protection from a doctrine whose only claim to judicial integrity is that it is ancient. A concept should not be permitted to longer live here just because it is old — it must also be just.[69]

64. Biscar v. University of Wyoming, 605 P.2d 374, 376 (Wyo. 1980).
65. *Id.*
66. Utah Constr. Co. v. State Highway Comm'n, 45 Wyo. 403, 19 P.2d 951 (1933); Price v. State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309 (1946); Harrison v. Wyoming Liquor Comm'n, 63 Wyo. 13, 177 P.2d 397 (1947); Ellis v. Wyoming Game and Fish Comm'n, 74 Wyo. 226, 286 P.2d 597 (1955); Hamblin v. Arzy, 472 P.2d 933 (Wyo. 1970); Retail Clerks Local 187 v. University of Wyoming, 531 P.2d 884 (Wyo. 1975).
67. Worthington v. State, 598 P.2d 796, 809 (Wyo. 1979) (Rose, J., dissenting); Oroz v. Board of County Comm'rs, 575 P.2d 1155, 1161 (Wyo. 1978) (Rose, J., specially concurring); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976).
68. 546 P.2d 419 (Wyo. 1976).
69. *Id.* at 429.

Justice Rose stated that in his view article 1, section 8 of the Wyoming Constitution "intended to and does furnish specific recognition that suit may be brought against the State of Wyoming, provided only that the State Legislature must establish the conditions and the forum under and in which the litigation may be undertaken."[70]

The contestant would not have to rely solely on Justice Rose's interpretation of this constitutional provision. Pennsylvania has a constitutional provision similar to article 1, section 8.[71] The Pennsylvania Supreme Court first interpreted its provision in much the same way that the Wyoming Supreme Court has interpreted article 1, section 8 of the Wyoming Constitution.[72] The Pennsylvania court, however, later judicially abrogated the doctrine of sovereign immunity.[73] In judicially abolishing sovereign immunity, the Pennsylvania Supreme Court utilized reasoning that was similar to that used by Justice Rose in *Jivelekas*.[74]

In 1978, the doctrine of sovereign immunity fell in Pennsylvania in the case of *Mayle v. Pennsylvania Department of Highways*.[75] In *Mayle,* the plaintiff brought suit against the Pennsylvania Department of Highways to recover damages for injuries he suffered as a result of the state's alleged negligence in maintaining a state highway. The Pennsylvania Supreme Court allowed the plaintiff's claim.

The court first reviewed article 1, section 11 of the Pennsylvania Constitution which provides:

> § 11. Courts to be open; suits against the Commonwealth.
>
> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct.[76]

The Pennsylvania Supreme Court then analyzed the various reasons used to justify continued application of the doctrine of sovereign immunity. The court found that the maxim "the King can do no wrong" was strongly attacked in the first case in Pennsylvania asserting the doctrine

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70. *Id.* at 430.

71. *See* PA. CONST. art. 1, § 11; Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 388 A.2d 709 (1978).

72. Patterson v. Wilson, 34 Pa. Commw. 58, 382 A.2d 1000 (1978); Spector v. Commonwealth, 462 Pa. 474, 341 A.2d 481 (1975).

73. Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 406, 388 A.2d 709, 720 (1978).

74. In *Mayle* the Pennsylvania Supreme Court interpreted article 1, section 11 of the Pennsylvania Constitution to be neutral on the subject of immunity. 479 Pa. at 400, 388 A.2d at 716. In *Jivelekas* Justice Rose appeared to take the view that article 1, section 8 of the Wyoming Constitution goes beyond being strictly neutral on the issue of sovereign immunity and concludes that article 1, section 8 "intended to and does furnish specific recognition that suit may be brought against the State of Wyoming." 546 P.2d 419, 430 (Wyo. 1976).

75. 479 Pa. 384, 388 A.2d 709 (1978).

76. PA. CONST. art. 1, § 11.

of sovereign immunity.[77] In addition, it found that the Commonwealth's argument, that abolition of sovereign immunity would result in a flood of litigation and the bankruptcy of the Commonwealth, was unsupported by evidence.[78] In fact, the Commonwealth admitted that it did not know what would happen to court dockets and the public fisc if sovereign immunity were abolished.[79] The court found that sheer speculation could not support such an unfair doctrine.[80]

In response to the Commonwealth's argument that the constitution established sovereign immunity, the court looked to the history surrounding the adoption of the constitution.[81] The court noted that the legislature of Pennsylvania rejected a resolution calling for an amendment to the federal constitution that would have protected the state from suits on their obligations in federal court. When such an amendment was proposed by Congress, Pennsylvania refused to ratify it.[82] In addition, after the American Revolution, Pennsylvania allowed claims to be filed against it for monies and services rendered during the revolution instead of hiding behind the doctrine of sovereign immunity.[83] Since Revolutionary and Post-Revolutionary War Pennsylvania was hostile to the notion that the state should enjoy the same prerogatives as the English crown, the court believed that the framers of the Pennsylvania Constitution did not intend to establish such a prerogative for the state.[84]

The supreme court further found that the Pennsylvania courts had adopted sovereign immunity in 1851 and that not until 1934 did the courts interpret the Pennsylvania Constitution as creating immunity for the state.[85] The Pennsylvania court regarded this interpretation of the constitution as being "a recent judicial construction . . . thrown into the breach to sustain a crumbling legal concept."[86] The court in *Mayle* also found it significant that since 1934 the Pennsylvania courts had relied on this constitutional theory and had offered no other substantial reasons for the doctrine's perpetuation.[87] The court then concluded that article 1, section 11 of the Pennsylvania Constitution did not preclude it from abrogating the doctrine of sovereign immunity. More specifically, the *Mayle* court found the provision of the constitution to be neutral in that it does not allow nor disallow suits against the state.[88]

Although the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution is certainly not binding on the Wyoming

77. 479 Pa. 384, 388-89, 388 A.2d 709, 710-11 (1978).
78. *Id.* at 394, 388 A.2d at 713-14.
79. *Id.* at 394, 388 A.2d at 714.
80. *Id.*
81. *Id.* at 399-406, 388 A.2d at 716-19.
82. *Id.* at 391, 388 A.2d at 712.
83. *Id.*
84. *Id.* at 400-04, 388 A.2d at 717-18.
85. *Id.* at 403-04, 388 A.2d at 718-19.
86. *Id.* at 405, 388 A.2d at 719, *quoting* Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974).
87. *Mayle*, 479 Pa. at 404, 388 A.2d at 719.
88. *Id.* at 400, 388 A.2d at 716.

Supreme Court, the contestant can still use the *Mayle* decision to argue persuasively that the doctrine of sovereign immunity should be abolished.[89] First, the contestant should point out that the Wyoming Constitutional provision[90] is even less supportive of the doctrine than the Pennsylvania provision. The Pennsylvania provision states that "[s]uits may be brought against the Commonwealth . . . *in such cases* as the legislature may by law direct."[91] Wyoming's provision simply provides that "[s]uits may be brought against the *state in such manner and in such courts* as the legislature may by law direct."[92] The plain language of the Pennsylvania provision seems generally to support sovereign immunity while giving the legislature the power to allow the state to be sued in specific cases. The Wyoming provision, as pointed out by Justice Rose in *Worthington*, expressly provides for suits against the state, while the Wyoming legislature shall direct the manner and courts in which such suits may be brought.[93]

The contestant should point out that the Pennsylvania Supreme Court found that Pennsylvania's provision was neutral on the subject of sovereign immunity.[94] Since neither Pennsylvania's constitution nor its legislature provided for sovereign immunity, the doctrine must have been judicially created.[95] Therefore, it could be judicially abrogated.[96] The Wyoming constitutional provision is at least as neutral on the subject of sovereign immunity. Therefore sovereign immunity in such actions can only exist if it has been judicially created. If the court has created this immunity, the court may abolish it.[97]

The key point is whether the Wyoming Constitution does establish sovereign immunity. The provision expressly provides for suits against the state or is at least neutral on the subject. The Wyoming Supreme Court

89. In fact, the historical analysis used by the *Mayle* court is similar to that advocated in Wyoming Supreme Court decisions establishing rules for constitutional interpretation. *See infra* text accompanying notes 100-03. For this reason, Justice Guthrie's criticism of the *Mayle* decision in *Worthington* was unjustified. For example, Justice Guthrie stated that *Mayle* "reveals that in arriving at that decision, great dependence was made upon the proceedings at the Constitutional Convention which were peculiar to that state." 598 P.2d 796, 802 (Wyo. 1979). In addition, Justice Guthrie quoted a passage from Justice Pomeroy's dissent in *Mayle* which stated that "it is well settled that a court should undertake an examination of a constitutional provision's historical setting only if the wording of the provision itself is ambiguous." 479 Pa. 384, 410, 388 A.2d 709, 722 (1978) (Pomeroy, J., dissenting). According to the Wyoming Supreme Court's decision in Chicago and N.W. Ry. v. Hall, 46 Wyo. 380, 393, 26 P.2d 1071, 1074 (1933), this is precisely the type of analysis the Wyoming Supreme Court should perform. Therefore, in interpreting article 1, section 8 of the Wyoming Constitution resort should be made to the conditions and circumstances existing at the time of the Wyoming Constitutional Convention. Because of this inconsistency, Justice Guthrie's statement that the *Mayle*-type of reasoning was inapplicable was incorrect.

90. WYO. CONST. art. 1, § 8.

91. PA. CONST. art. 1, § 11 (emphasis added).

92. WYO. CONST. art. 1, § 8 (emphasis added).

93. 598 P.2d 796, 809 (Wyo. 1979) (Rose, J., dissenting).

94. Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 400, 388 A.2d 709, 716 (1978).

95. *Id.* at 399-406, 388 A.2d at 716-19.

96. *Id.* at 399, 388 A.2d at 716.

97. McClellan v. Tottenhoff, 666 P.2d 408, 411 (Wyo. 1983).

in *Hjorth* came to a different conclusion.[98] The contestant must show the court that its previous interpretation of article 1, section 8 was erroneous. The contestant can do this by using the *Mayle* case as an example of proper constitutional analysis, and by using the rules of interpretation the Wyoming Supreme Court has approved.[99]

Interpretation of Article 1, Section 8 of the Wyoming Constitution

Article 1, section 8 of the Wyoming Constitution is ambiguous. On the one hand, it is possible to construe the provision, as the *Hjorth* court did, as providing for immunity absent legislative action to the contrary.[100] On the other hand, the provision and its caption state that suits may be brought against the state. From this language it is possible to infer that the people of the Territory of Wyoming did not intend to have the constitution establish sovereign immunity. Indeed, as Justice Rose has pointed out, the Wyoming Constitution may be interpreted to expressly provide for suits to be brought against the state.[101]

In construing constitutional provisions the court is attempting to give effect to the intentions of the people adopting the constitution.[102] In order to determine the meaning of article 1, section 8, the Wyoming Supreme Court must analyze circumstances existing at the time of the Wyoming Constitutional Convention and ascertain the intention of the people adopting the constitution.[103] Additionally, in determining the meaning of words within a constitutional provision, the court must also consider the probable intention of the framers of the constitution in adopting the constitutional provision[104] and construe the provision according to the natural and most obvious import of the language used.[105] The court can look to the debates of the convention.[106] In addition, the court should look to the *Address to the People* issued at the end of the Constitutional Convention.

The Wyoming Supreme Court in *Hjorth* did not follow the above approaches when it interpreted article 1, section 8 of the Wyoming Constitution. It made no attempt to perform the analysis that its own previous decisions required. The only authority that the *Hjorth* court cited for its holding that article 1, section 8 created sovereign immunity in Wyoming, was the multi-volume treatise *Cyclopedia of Law and Procedure.*[108] Justice

98. Hjorth Royalty Co. v. Trustees of Univ., 30 Wyo. 309, 222 P. 9 (1924).
99. *See supra* text accompanying notes 89-97; *see infra* text accompanying notes 102-07.
100. 30 Wyo. 309, 222 P. 9 (1924).
101. Jivelekas v. City of Worland, 546 P.2d 419, 430 (Wyo. 1976).
102. Zancanelli v. Central Coal and Coke Co., 25 Wyo. 511, 550, 173 P. 981, 991 (1918).
103. Chicago and N.W. Ry. v. Hall, 46 Wyo. 380, 393, 26 P.2d 1071, 1074 (1933).
104. Certain-Teed Products Corp. v. Comly, 54 Wyo. 79, 91, 87 P.2d 21, 24 (1939).
105. Rasmussen v. Baker, 7 Wyo. 117, 133, 50 P. 819, 823 (1897).
106. Chicago and N.W. Ry. v. Hall, 46 Wyo. 380, 393, 26 P.2d 1071, 1074 (1933).
107. Grand Island and N. Wyo. R.R. v. Baker, 6 Wyo. 369, 391, 45 P. 494, 500 (1896). The *Address to the People* was prepared by a committee of the constitutional convention and was submitted to the convention. This address was entered into the record as part of the convention's proceedings. The purpose of the address was to state to the voters of the territory reasons for ratifying the constitution.
108. 30 Wyo. 309, 313, 222 P. 9 (1924), *citing* 36 W. MACH, CYCLOPEDIA OF LAW AND PROCEDURE 913 (1910).

Rose has recognized the existence of these rules of interpretation and the need for their application. But from his dissenting opinion in *Worthington*, it appears that his analysis is incomplete.[109]

The conditions leading up to and existing in Wyoming at the time of the Constitutional Convention can be summarized briefly. On July 25, 1868, the President of the United States signed the Organic Act of Wyoming and created the Territory of Wyoming.[110] The government established was not an example of home rule. The governor of the territory, the secretary, the chief justice and associate justices, the attorney for the territory, and the marshal were all appointed by the President of the United States.[111] The Organic Act of Wyoming also established a legislature but since Wyoming was a territory a congressional enactment could pre-empt any action taken by the local legislature.[112] The territory was also entitled to a representative in the House of Representatives who was to enjoy the same privileges as representatives from other territories.[113] According to statute, however, a representative to the House of Representatives from a territory was entitled to enter into debates on matters but was not entitled to vote.[114]

In the *Address to the People,* the framers of the Wyoming Constitution summarized the situation as follows:

> For twenty years and more Wyoming has been laboring under the disadvantages of a territorial form of government. The disadvantages are numerous. We have no voice in the selection of the most important officers who administer our local affairs; no voice in the enactment of Laws by Congress, to which we must yield obedience; and no voice in the election of the chief magistrate of the republic, who appoints the principal officers by whom the executive and judicial affairs of our territory are administered. It has been well said, "A territory cannot have a settled public policy. The fact that Congress may at any time annul its legislation on any matter of purely local concern, prevents active co-operation by the people on those higher planes of public life which result in the establishment of a permanent state policy." The abuse of the veto power by alien governors, the lack of familiarity of alien judges with our laws, and the frequent changes of our executive and judicial officers, as it has been in the past and may be again in the future, cannot but discourage the people. Although citizens of the United States, in name, we have, in fact, been disfranchised.[115]

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109. *See* Worthington v. State, 598 P.2d 796, 809 (Wyo. 1979) (Rose, J., dissenting).
110. Organic Act of Wyoming, ch. 235 § 1, 15 Stat. 178 (1868).
111. Organic Act of Wyoming, ch. 235 § 11, 15 Stat. 178, 181 (1868).
112. *See also* ERWIN, WYOMING HISTORICAL BLUE BOOK 159 (1946).
113. Organic Act of Wyoming, ch. 235, § 13, 15 Stat. 178, 182 (1868).
114. An Act to Regulate the Territories of the United States, ch. 42, § 1, 3 Stat. 363 (1817).
115. CONSTITUTION OF THE PROPOSED STATE OF WYOMING 57 (1889) (available in Coe Library, Univ. of Wyoming).

At the time the Wyoming Constitution was drafted, the balance of power was more in favor of the federally-created territorial government than it was in favor of the people. In establishing a state government, the people of the territory sought to create a government that was responsive to their needs. The people of the territory were being governed, by the territorial government, which was for all practical purposes an extension of the federal government. One of the factors that must have contributed to the dissatisfaction the people of Wyoming had toward the territorial government was the fact that the government enjoyed immunity from suit.[116] In the normal interactions between government and the governed, claims are bound to arise against the government. Most assuredly, claims arose against the territorial government of Wyoming. Because the territorial government enjoyed immunity from suit these claims went uncompensated. It is reasonable to conclude that the people of Wyoming, by establishing their own form of government, intended to eliminate the inequity caused by the doctrine of sovereign immunity.

A reading of article 1, section 8 supports the inference that the framers intended to have the courts of the state *open to all.* Arguably, the framers would not have used such all encompassing language if they actually intended the courts to be closed to claimants who suffer at the hands of the state. A better interpretation of article 1, section 8, however, is that in the first sentence, the framers literally intended the courts *to be open to all.* In order to give effect to their intention that the state's courts should be open to all, the framers thought that it was necessary to expressly *prevent* the application of the doctrine of sovereign immunity. For that reason, the framers explicitly provided for suits to be brought against the state while authorizing the legislature to determine *the manner and the courts* in which such actions could be entertained. The fact that the framers even believed that the issue of sovereign immunity had to be specifically dealt with in the constitution can be inferred from the fact that many of the delegates to the convention were lawyers.[117]

Lastly, one of the purposes for becoming a state was to encourage the economic development of the territory.[118] In the *Address to the People,* there is a reference that statehood would free the territory from "political and industrial bondage."[119] The contention was that territorial status was retarding the development of the territory. In *The Constitutional Convention of Wyoming,* the author described the economic condition of the territory as follows:

> The dry summer of 1886, followed by a severe winter, had played havoc with Wyoming's cattle business, and the Territory of Wyoming was primarily a cattle country. Following the very

116. Utah Constr. Co. v. State Highway Comm'n, 45 Wyo. 403, 417, 19 P.2d 951, 952 (1933).

117. Peterson, *The Constitutional Convention of Wyoming,* 7 UNIV. OF WYO. PUBLICATIONS 101, 124 (1940).

118. *Id.* at 104.

119. CONSTITUTION OF THE PROPOSED STATE OF WYOMING 57 (1889) (available in Coe Library, Univ. of Wyoming).

> heavy losses of cattle came a period of low prices. Some cattleman were ruined; many others quit the business and left the territory. Economic conditions were hard, and Wyoming people looked forward to a dark future. Statehood suggested itself to some political leaders as a way out. Capital investments from outside could not be expected in a community subject to the uncertainty of territorial government. With statehood, outside capital would flow in, railroads would be built, almost unlimited natural resources would be developed, and Wyoming would again be prosperous. Moreover, since the territory had served its apprenticeship, why should it continue to be governed by carpet baggers? Why should it not participate in the national government?[120]

If one of the purposes of statehood was to attract investment and development in the state, then interpreting the constitution to establish sovereign immunity is not entirely consistent with this purpose. If the state was attempting to attract industry and business, it seems reasonable to conclude that there would be efforts expended toward creating as hospitable a business environment as possible. Since sovereign immunity is notorious for inequitable results, it does not seem logical that the people of Wyoming intended to adopt sovereign immunity as the law in the state.

Applying the above rules of interpretation to article 1, section 8 of the Wyoming Constitution presents the following results. First, the "obvious and ordinary" meaning of the words used in the second sentence of article 1, section 8, is that suits *may* be brought against the state. The *manner* and not the specific *cases*, in which suit may be brought is left to the legislature to decide. Second, the second sentence of article 1, section 8 is not to be interpreted as a "sequestered pronouncement" but is to be read in light of other provisions. The first sentence of article 1, section 8 made the courts open to all. The second sentence furthered this intention by providing for suits against the state. Without this interpretation, parties who have claims against the state would be unable to bring suit and the courts would then *not* be open to all. Third, the conditions and circumstances existing at the time of passage of the Wyoming Constitution support the conclusion that the people did not intend to create sovereign immunity in Wyoming in article 1, section 8.[121]

The contestant can rely on both the *Mayle* case and the usual rules of constitutional interpretation to come to the above conclusions. These conclusions are not those reached by the Wyoming Supreme Court in *Hjorth*, where the court interpreted the constitution without resort to the accepted rules of constitutional interpretation. The court can and should find that its interpretation of article 1, section 8 in *Hjorth* as providing for sovereign immunity was erroneous.

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120. Peterson, *supra* note 117, at 101 (1940).
121. *See supra* text accompanying notes 110-20.

Legislatively Created Sovereign Immunity

If the state argues that sovereign immunity has been statutorily enacted, the contestant has an easy argument to rebut.[122] Under this second argument, the state would be contending that the doctrine of sovereign immunity became part of the law of the state when the legislature enacted section 8-1-101 of the Wyoming statutes. By enacting section 8-1-101, the legislature adopted the common law of England as it existed in 1607 as the rule of decision in Wyoming. The crux of this argument is that if sovereign immunity was adopted by the legislature in enacting section 8-1-101 then a legislative enactment is necessary to abolish the doctrine.[123]

The weakness in this argument is that it ignores one of the most fundamental attributes of Anglo-American jurisprudence, which is the ability of the law to adapt to changes in society.[124] In adopting the common law of England, the legislature also adopted the ability of the courts to change this law to meet changed circumstances. Even though the argument that sovereign immunity became the law in Wyoming when the legislature adopted the common law of England as it existed in 1607, has a certain appeal, it becomes untenable when taken to its logical extreme. The Board of Land Commissioners is effectively arguing that by enacting section 8-1-101, the Wyoming legislature "locked in" the law of England as it existed in 1607, and any change after section 8-1-101 was enacted would require legislative action. If the legislature adopted sovereign immunity by adopting the common law of England, then it also adopted the ability of the courts to change the common law and, in turn, empowered the courts to abrogate the doctrine. The Wyoming Supreme Court in *McClellan v. Tottenhoff* expressly stated that in enacting section 8-1-101 the legislature was not adopting a "set code of law."[125]

The contestant in this water right abandonment action should argue for abrogation of sovereign immunity. If the Board of Land Commissioners argues that sovereign immunity is established in the Wyoming Constitution, the contestant should meet this argument with the reasoning found in *Mayle*[126] and through application of the Wyoming Supreme Court's rules for constitutional interpretation. If the Board of Land Commissioners argues that sovereign immunity was adopted by section 8-1-101, then the contestant should argue that a fundamental attribute of the common law is its ability to be changed by judicial decisions. Failure to take this into account is to contend that the law of England as it was in 1607 is to govern 20th century life in Wyoming. Finally, the contestant should emphasize that in leasing lands the state is no longer carrying on the functions of a sovereign, but is engaging in a proprietary function, and is therefore not entitled to protection by the doctrine of sovereign immunity.

122. *See supra* text accompanying notes 46-49.
123. *Id.*
124. 15A AM. JUR. 2D *Common Law* § 3 (1976).
125. 666 P.2d 408, 410 (Wyo. 1983).
126. Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 388 A.2d 709 (1978).

CONCLUSION

Sovereign immunity has been analyzed here from the standpoint of a water right abandonment action brought against the state. Most other commentators have written about sovereign immunity as it has been applied to contract and tort cases.[127] The water right abandonment action involves different state interests than tort and contract cases.

The state, more specifically the Board of Land Commissioners, is responsible for the efficient utilization of state lands. Its duty includes maximizing the value to be obtained currently from these lands and to preserve the value of the lands for future generations. Part of the value of state-owned land is the appurtenant water right. On the other hand, the contestant and the Board of Control have an interest in making sure that *water resources* are being put to maximum beneficial use. They are not concerned with present and future uses for state-owned lands. To the extent that maximizing current use of water requires abandoning state-owned water rights, these two interests are in direct conflict. When these interests conflict, the issue is which interest should be favored? In answering this question, various factors must be taken into account in addition to just the facts found in a particular water rights abandonment proceeding. Delicate, and often complicated, political and economic factors must be considered in determining which interest should be favored. Clearly, the courts are not the proper forum for weighing these factors. The duty of resolving this issue is with the legislature.[128]

But that is not what is happening under the law in Wyoming as it stands today. The legislature, for all practical purposes, is not being confronted with this issue. The Wyoming Supreme Court is pre-empting the legislature by applying the historical accident of sovereign immunity. A great deal can be learned from the experience with *Oroz*. After the Wyoming Supreme Court abrogated the doctrine of governmental immunity the legislature enacted the Wyoming Governmental Claims Act.[129] Abrogation of governmental immunity resulted in the legislature deciding the appropriate times to claim immunity.

Such a result is needed in the water right abandonment action mentioned throughout this work. Abrogation of sovereign immunity would permit the action to be brought against the state. The legislature will then have to decide which interest should be favored. Should it be the interest represented by the Board of Land Commissioners or the interest represented by the contestant and the Board of Control?

The water right abandonment action illustrates the nature of the doctrine of sovereign immunity. Here sovereign immunity reared its ugly head in what started out as an administrative proceeding in an action which

127. *See supra* note 1.
128. Zancanelli v. Central Coal and Coke Co., 25 Wyo. 511, 534, 173 P. 981, 986 (1918).
129. WYO. STAT. 1-39-101 to -119 (Supp. 1984).

did not exist in ancient England. The doctrine, in effect, impedes the legislature in confronting modern day issues.

The Wyoming Supreme Court should abrogate the doctrine completely. Any attempt at abrogation on a case-by-case or some other piecemeal approach will most likely result in the infuriating and frustrating discovery that the doctrine possesses a greater resiliency toward death than did Rasputin. Once abrogated, the legislature will have to decide which state interests should enjoy immunity and the extent of that immunity.

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